

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

MONDAY, THE SECOND DAY OF AUGUST
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE V.V.S.RAO

WRIT PETITION NO : 13355 of 2004

Between:

S.M. Creative Electronics Limited,

10, Electronic City, Sector-18, Gurgaon-122 015,
Haryana, India, rep. by its Branch Head and authorised Representative Sri T.
Jayasree Ramulu, having its Branch
Office at C-5, 1st Floor, Vikrampuri Colony, Sec-bad, A.P.

..... PETITIONER

AND

1 Bharat Sanchar Nigam Ltd, (Govt. of India Enterprises), 9th Floor,

Room No. 916, Door Sanchar Bhawan, Nampally, Station Road,

Abids, Hyderabad, Rep. by its Chief General Manager, A.P. Circle.

2 Bharat Sanchar Nigam Ltd, (Govt. of India Enterprises),

Room No.907, 9th Floor, Door Sanchar Bhawan, Nampally, Station

Road, Abids, Hyderabad, Rep. by its Asst. General Manager,

(M.M.SWP).

3 M/s Delta Energy Systems India Pvt. Ltd, 34, Udyog Vihar, Phase 4,

Gurgaon- 122 016, Haryana, India, rep. by its Authorised

Representative, M. Harish Tandon.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ, order or direction, more particularly one in the nature of Writ of Mandamus declaring the action of the Respondents 1 and 2 in refusing to accept the tender documents of the Petitioner in pursuance of their tender No. TA/MM/3-41/T/NT/2004-2005 dated 7-6-2004 is arbitrary and illegal the violative of Article 14

of the Constitution of India and consequently direct the Respondents 1 and 2 to cancel the work allotment in favour of the 3rd Respondent in pursuance of the tender No. TA/MM/3-41/T/NT/2004-2005 dated 7-6-2004 which was opened on 17-7-2004 and further directing the Respondents 1 and 2 to call for a fresh tenders for executing the works as mentioned in tender No. TA/MM/3-41/T/NT/2004-05 dated 7-6-2004.

Counsel for the Petitioner:MR.V.V.N.NARAYANA RAO

Counsel for the Respondents 1 and 2: MR.KANTHI.NARAHARI

Counsel for the Respondent No.3: None appears

The Court at the admission stage made the following :

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.13355 OF 2004

ORDER:

First respondent invited tenders by issuing notice inviting tenders (NIT) for supply of items of stores. Intending persons were required to obtain tender documents by paying amount of Rs.560/- on or before 14.7.2004 upto 17.00 hrs of any working day. The NIT also provided that the intending tender bidders may download tender document from the website in which event such persons have to enclose the cost of the tender document of Rs.560/- by way of Demand Draft with the eligibility document. The tender document also requires the bidders to furnish bid documents establishing bidders eligibility. The demand draft towards the cost of the bid document has to accompany the eligibility documents. The bid has to be submitted in two covers. First cover shall contain original copy of the bid and second cover shall contain documents establishing bidders eligibility with bid security and both covers are to be sealed separately. The procedure involves opening second cover containing eligibility documents. When a bidder does not satisfy eligibility criteria, there is no obligation on the part of the tendering authority to open first cover containing bid.

Pursuant to NIT dated 7.6.2004, petitioner downloaded bid document and submitted to first respondent. The bids were opened on 17.7.2004. Second respondent refused to accept the bid of the petitioner on the ground the eligibility document (second cover) does not contain the cost of the bid document by Draft for Rs.560/-. For that reason, the price bid was not opened and it was decided to award contract to third respondent. This Writ Petition is filed seeking a declaration that the action of the respondents 1 and 2 in refusing to accept the bid of the petitioner, is arbitrary and illegal. A consequential relief is also prayed seeking a direction to cancel the contract awarded to third respondent.

Learned counsel for the petitioner, Sri V.V.N.Narayana Rao vehemently submits that petitioner has submitted Demand Draft along with first cover and it was mistake on

the part of the second respondent to come to a conclusion that petitioner did not enclose such demand draft. He also placed before me original eligibility documents alleged to have been put in the second cover. He invites attention of this Court to a Demand Draft bearing No.370206 dt.28.6.2004 issued by Oriental Bank of Commerce, Hyderabad, drawn in favour of Accounts Officer (Cash), O/o. C.G.M., Telecom, A.P.Circle, BSNL, Hyderabad. Learned counsel would urge that respondents 1 and 2 have acted in arbitrary manner and awarded contract to third respondent, though the petitioner's tender is more responsive and that third respondent quoted higher price than the petitioner.

It is not denied that the contract has already been awarded. In such a case, ordinarily this Court would not entertain the Writ Petition. It is no doubt true that even where public authority is dealing with contractual matters, a Writ Petition would be maintainable to question the action of the public authority in contractual matters if the same is discriminatory and arbitrary. However, when once there is a concluded contract between public authority and third party, a Writ Petition for canceling the contract would not be maintainable, unless it is shown that fraud and misrepresentation played role in the concluded contract.

A reference may be made to the decision of the Supreme Court in **Radhakrishna Agarwal v. State of Bihar** wherein it was held that the power to enter into contract is not always regulated by the Constitution. The relationship of persons to the contract are regulated by the contract. The State as well as other persons to the contract are bound by the obligations in the contract. Though the relationship between the persons to the contract is not the relationship of master and servant, after entering into contract, the relations are no longer governed by the constitutional provisions, but by the legally valid contract. The remedy under Article 226 of the Constitution is not a proper remedy for redressing the grievance of the parties to the contract. The following observations of the apex Court in **Radhakrishna Agarwal v. State of Bihar** (supra) further lay down as under.

.....Even if the appellants could be said to have raised any aspect of Art. 14 of the Constitution and this Article could at all be held to operate within the contractual field whenever the State enters into such contracts, which we gravely doubt, such questions of fact do not appear to have been urged before the High Court. And in any event, they are of such a nature that they cannot be satisfactorily decided without a detailed adduction of evidence, which is only possible in ordinary civil suits, to establish that the State, acting in its executive capacity through its officers, has discriminated between parties identically situated. On the allegations and affidavit evidence before us we cannot reach such a conclusion. Moreover, as we have already indicated earlier, the correct view is that it is the contract and not the executive power, regulated by the Constitution, which governs the relations of the parties on facts apparent in the cases before us.

A reference may also be made to a decision of the Supreme Court in **State of U.P. v. Bridge & Roof Co. (India) Ltd.** wherein it was laid down that in a contract relating to work, it is a contract in private law and does not attract Article 226 of the Constitution. It is apposite to extract paragraph 16 of the judgment which reads as under.

Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a Contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil Court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting particular amount from the writ petitioners' bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

Yet another reference may also be made to a Division Bench judgment of this Court in **Reliable Power Systems (P) Ltd. v. Government of India** wherein it was held that in contractual matters to amend, alter or vary the express terms of contract, in exercise of jurisdiction under Article 226 of the Constitution, cannot determine the private rights of the parties as such determination also involves enquiry into disputed question of fact.

The condition that a bidder should enclose a Demand Draft for an amount of Rs.560/- when the bid document is downloaded from the website is a condition which requires strict compliance. At the time of opening tenders, the second respondent found that the petitioner did not enclose such Demand Draft along with eligibility document, which is contained in the second cover. A bidder should keep demand draft in the second cover containing eligibility documents is also a condition requiring strict compliance. In paragraph-4 of the affidavit accompanying the Writ Petition, the petitioner admits that he has put Demand Draft in first cover containing original and copy of the bid. Therefore, there is non-compliance with the condition. This could have been averted by petitioner by producing Demand Draft at the time of bid opening as per terms and conditions of NIT. The petitioner did not do so. The non-compliance with the condition even in a small way is a serious matter and petitioner has to suffer the lapse. In this connection, a reference may

be made to **Ram Gajadhar Nishad v. State of Uttar Pradesh**, **G.J. Fernandez v. State of Karnataka** and **West Bengal Electricity Board v. Patel Engg. Corpn.**

In **Ram Gajadhar Nishad v. State of Uttar Pradesh** (supra), the tender conditions required the tenderer to submit solvency certificate to the Collector. The Supreme Court interpreted the condition as requiring strict compliance and that non-compliance with the condition would lead to non-acceptance of the tender. In **G.J. Fernandez v. State of Karnataka** (supra), the Supreme Court considered a case where the notification inviting tenders by Karnataka Power Corporation Ltd., was in XII paras, and the question was whether the conditions in Part-I and V are mandatory. Para-I laid down pre-conditions of eligibility for submitting a tender. Para-V requires the tenderers to supply the details called for. The Supreme Court held that the pre-conditions of eligibility for submitting tender must be considered as

mandatory, and that omission to supply every small detail referred to in Para-V will not affect the eligibility under Para-I and disqualify the tenderer. It was also indicated that the various conditions should be considered in a harmonious and practical manner. Be it noted that Para-I laid down the pre-conditions of eligibility and Para-V required supplying of details for assessing the fulfilment of conditions in Para-I. The Supreme Court referred to the ratio in **R.D. Shetty v. International Airport Authority** in support of the view that all conditions of tender cannot be interpreted as requiring strict compliance. The following observations are apt and may be extracted.

.....It is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in **Ramana case** will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the applicant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration. If, save for the delay in filing one of the relevant documents, MCC is also found to be qualified to tender for the contract, no injustice can be said to have been done to the appellant by the consideration of its tender side by side with that of the MCC and in the KPC going in for a choice of the better on the merits.

G.J. Fernandez v. State of Karnataka (supra) is an authority for the proposition that pre-conditions of eligibility cannot be deviated from and strict compliance test should be applied, whereas the conditions requiring formalities in relation to the pre-conditions can be deviated from without causing prejudice to the rival competitors as they require a substantial compliance only. **G.J. Fernandez v. State of Karnataka** (supra) was followed in **Poddar Steel Corpn. v. Ganesh Engg. Works** and it was held thus:

... As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories – those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases...

(emphasis supplied)

In **West Bengal Electricity Board v. Patel Engg. Corpn.** (supra), the respondent requested permission to correct a 'repetitive systematic computer typographical transmission error' in their tender submitted by it pursuant to the tender notification issued by the West Bengal Electricity Board. The appellant evaluated the bid and pointed out a number of arithmetical errors. Challenging the

same, a writ petition was filed in the High Court at Calcutta. A learned single Judge of the High Court directed the West Bengal Electricity Board to reconsider the representation of the respondent and pass a reasoned order. A Division Bench of the High Court in writ appeal agreed with the learned single Judge and further directed the West Bengal Electricity Board to correct the errors in the tender documents. In appeal by the West Bengal Electricity Board, the Supreme Court reversed the judgment of the High Court at Calcutta holding that the instructions to bidders have to be strictly complied with, and there can be no departure therefrom. It is apposite to quote the following:

... The degree of the care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant-respondent Nos. 1 to 4 and respondent Nos. 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfill prequalification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our constitutional values. **The very purpose of issuing rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubt in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest.**

(emphasis supplied)

In the result, for the above reasons, the Writ Petition is dismissed. No costs.

(V.V.S.RAO, J)

2.8.2004

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ASSISTANT REGISTRAR

// TRUE COPY //

SECTION OFFICER

To

1. The Chief General Manager, A.P.Circle, Bharat Sanchar Nigam Ltd,
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3 2 CCs to Mr. Kanthi Narahari, Advocate

4 2CD copies.